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SCOTT WICKERSHAM, INC., JACK G.
KENNEDY, III, and PERRY SCOTT
WICKERSHAM,

VS.

Appellee-Plaintiff.

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No. 68A01-0708-CV-378

APPEAL FROM THE RANDOLPH SUPERIOR COURT
The Honorable Peter D. Haviza, Judge
Cause No. 68D01-0406-CT-560

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

Jack G. Kennedy, III, appeals a judgment in favor of Darien C. Wilson. Kennedy raises two issues, which we restate as:

- I. Whether the trial court abused its discretion by denying Kennedy's motion to correct error concerning a motion for mistrial filed by Kennedy's co-defendants; and
- II. Whether the jury's verdict is excessive.

We affirm.

The relevant facts follow. On March 7, 2003, Kennedy and Wilson were involved in a fight outside of the A&B Café in Winchester, Indiana. Although thirty-five-year-old Wilson had pain in his leg after the fight, he declined medical treatment at that time. During the night, his leg began to swell, and he experienced severe pain. Wilson was eventually taken to the hospital by ambulance.

The doctors found that Wilson had sustained two fractures in his leg – comminuted¹ fractures of his right tibia and his fibula. The fractures had resulted in compartment syndrome.² When he came to the hospital, Wilson had no blood flow in his leg below his knee. He was hospitalized for nine days and had four surgeries. After the first surgery, the surgeon left an open incision in Wilson's leg because of the severe swelling. During the subsequent surgeries, the surgeon would attempt to close some of

¹ Comminuted “means that there are several fragments” rather than “one clean break.” Appellant's Appendix at 401.

² Compartment syndrome is “a painful condition resulting from the expansion or overgrowth of enclosed tissue (as of a leg muscle) within its anatomical enclosure (as a muscular sheath) producing pressure that interferes with circulation and adversely affects the function and health of the tissue itself -- called also *compartmental syndrome*.” MERRIAM-WEBSTER'S MEDICAL DICTIONARY, available at <http://medical.merriam-webster.com> (last visited April 17, 2008).

the incision, remove dead muscle tissue, and clean the wound. According to the orthopedic surgeon, compartment syndrome is “one of the most painful conditions that can . . . be suffered.” Appellant’s Appendix at 427.

As a result of the injuries to his leg, Wilson suffered damage to the peroneal nerve, resulting in a permanent inability to flex his foot upward, which is sometimes called “dropped foot.” Id. at 439. Because of his inability to flex his foot, Wilson walks with the aid of a foot drop splint. Wilson also has “a very mild hyperesthetic condition” in his leg, which means that he has abnormal pain instead of normal feelings in his leg. Id. at 457. Wilson is at risk for developing reflex sympathetic disorder, which is a “painful condition” in which the limb “becomes very sensitive to any kind of stimuli.” Id. at 456. Wilson is unable to work and receives Social Security Disability benefits.

Wilson filed a complaint against Kennedy and the owner of the A&B Café, Scott Wickersham, Inc., and Perry Scott Wickersham and Vanessa Carol Wickersham (collectively, the “Wickershams”). The Wickershams filed a motion in limine requesting an order in limine preventing “law enforcement or other witnesses” from testifying that the A&B Café stands for “Assault & Battery.” Id. at 121. The trial court granted the motion in limine.

At the jury trial, Carrie Scharff, Wilson’s girlfriend at the time of the fight, testified. Scharff had a stroke seventeen months before the trial, and her speech was somewhat slower than normal. During her testimony, the following discussion occurred:

Q And where did you go?
A Uh hum. Assault and Battery. Uh hum, A&B.
Q Who's idea was it to go to the, to the A&B?
A John Brooks. He was looking for someone he knew.

Id. at 253. None of the defendants objected to Scharff's reference to the A&B Café as the "Assault and Battery." During a recess off the record, the trial court apparently reminded Wilson's counsel to instruct his witness not to use the phrase "Assault and Battery." During cross examination by counsel for the Wickersham defendants, Scharff testified as follows:

Q And Darien did some things that night that made you mad didn't he?
A Uh hum. Talking about?
Q The whole evening from the time of the nipple ring onward?
A Uh hum. No. I was concerned about him all the way up, as we, came from Assault and Battery, uh hum, uh hum.

Id. at 291-292. At this point, counsel for the Wickershams objected. Outside the presence of the jury, counsel for the Wickershams requested a mistrial. The trial court denied the motion for a mistrial and instructed the jury as follows: "Ladies and gentleman of the Jury, I am going to strongly admonish you, you are to disregard the last statement made by the witness as if that statement had never been made, completely put it out of your minds. You may proceed." Id. at 298-299. Kennedy did not object to Scharff's testimony and did not request a mistrial.

The jury found that Wilson was 10% at fault, Kennedy was 47.5% at fault, and the Wickershams were 42.5% at fault and that Wilson had suffered \$565,000.00 in damages. Thus, the trial court entered judgment for Wilson and against Kennedy for \$268,375.00 and for Wilson and against the Wickershams for \$240,125.00.

The Wickershams and Kennedy filed motions to correct error. In particular, Kennedy argued that Scharff's violation of the order in limine prejudiced him and that the verdict was excessive. After a hearing, the trial court denied the motions to correct error. As for the mistrial, the trial court noted that: (1) the order in limine was primarily directed toward law enforcement and others from testifying that the A&B Café had a reputation and was known as the "Assault & Battery;" (2) Scharff did not testify that the A&B Café was known as or had a reputation as the "Assault & Battery;" (3) the jury "probably would not have picked up any great significance from [Scharff's] use of the words;" (4) "the Court did not view any significant prejudice to the defendants from the brief mention of 'Assault & Battery' out of context of the motion in limines' primary concerns of police officers voicing opinion that it was the 'Assault & Battery' Café;" and (5) any error was cured by the admonishment. Id. at 143-144. Noting that a large part of the claim for damages was pain and suffering and that Wilson's impairment and life expectancy were of further significance, the trial court recognized that the verdict was high but could not "say that the verdicts are outside of the scope of the evidence on damages."³ Id. at 149.

I.

The first issue is whether the trial court abused its discretion by denying Kennedy's motion to correct error concerning a request for a mistrial filed by the

³ Wilson and the Wickershams filed a joint motion to dismiss the Wickershams' appeal, which this court granted. Thus, this appeal concerns only the judgment against Kennedy.

Wickershams. The standard of appellate review of trial court rulings on motions to correct error is abuse of discretion. Paragon Family Restaurant v. Bartolini, 799 N.E.2d 1048, 1055 (Ind. 2003). An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the court, including any reasonable inferences therefrom. Id.

Kennedy argues that the trial court abused its discretion by denying his motion to correct error. Specifically, Kennedy argues that the trial court should have granted the Wickershams' request for a mistrial as a result of Scharff's reference to the "Assault & Battery." The trial court's determination of whether to grant a mistrial is afforded great deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of a reference and its impact on the jury. Stone v. Stakes, 749 N.E.2d 1277, 1279 (Ind. Ct. App. 2001), reh'g granted by, 755 N.E.2d 220 (Ind. Ct. App. 2001), trans. denied. To prevail on appeal from the denial of a motion for mistrial, the movant must demonstrate that the statement in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. Id. However, mistrial is an extreme remedy to be granted only when no other less drastic measure can rectify the perilous situation. Id. We determine the gravity of the peril by the probable persuasive effect of the misconduct on the jury's decision rather than by the degree of impropriety of the conduct. Id.

The Wickershams requested a mistrial because of Scharff's reference to the "Assault & Battery" during her testimony, and the trial court denied the request for a mistrial but admonished the jury. We begin by noting that the Wickershams, not

Kennedy, requested the mistrial, and Kennedy did not join in the Wickershams' request. In fact, Kennedy did not raise the issue until he filed his motion to correct error.

A party must object to alleged misconduct, and he must also request an appropriate remedy. Etienne v. State, 716 N.E.2d 457, 461 (Ind. 1999). "Generally, the correct procedure is to request an admonishment." Id. "However, if counsel is not satisfied with the admonishment or it is obvious that the admonishment will not be sufficient to cure the error, counsel may then move for a mistrial." Id. Kennedy's failure to object, to request an admonishment, or to move for a mistrial results in waiver of the issue. Kennedy's motion to correct error was not sufficient to preserve the issue for his appeal. See, e.g., Becker v. Plemmons, 598 N.E.2d 564, 568 (Ind. Ct. App. 1992) (holding that a motion for a mistrial after a lunch recess was untimely). Further, the Wickershams' request for a mistrial was not sufficient to preserve the issue for appeal by Kennedy. See, e.g., Rouster v. State, 600 N.E.2d 1342, 1346 (Ind. 1992) (holding that a defendant could not rely on a codefendant's motion for severance to preserve error for appellate review where he failed to request a separate trial), reh'g denied; Deaton v. State, 271 Ind. 14, 17, 389 N.E.2d 293, 296-297 (Ind. 1979) (holding that a defendant waived his right to challenge the denial of a codefendant's motion to dismiss where the defendant did not join in the motion).

Waiver notwithstanding, we cannot say that Kennedy was so prejudiced as to be placed in grave peril by Scharff's comment. The two references to the "Assault & Battery" were made in passing during Scharff's testimony. Scharff did not specifically say that the A&B Café had a reputation for fighting. Moreover, the reference to the A&B

Café as the “Assault & Battery” would have more of an impact on the Wickershams as owners of the A&B Café than Kennedy, who was merely a patron of the A&B Café.

“A timely and accurate admonition is presumed to cure any error in the admission of evidence.” Banks v. State, 761 N.E.2d 403, 405 (Ind. 2002). The trial court issued a timely admonition to the jury to disregard Scharff’s comment. We conclude that Kennedy has failed to demonstrate prejudice by Scharff’s comment, and the trial court’s admonition sufficed to cure any error. See, e.g., id. (holding that a timely admonition sufficed and that the trial court did not err by denying the motion for a mistrial). Therefore, the trial court did not abuse its discretion by denying Kenney’s motion to correct error.

II.

The next issue is whether the jury’s verdict was excessive. “A jury determination of damages is entitled to great deference when challenged on appeal.” Sears Roebuck and Co. v. Manuilov, 742 N.E.2d 453, 462 (Ind. 2001). We will not substitute our idea of a proper damage award for that of the jury. Id. (citing Prange v. Martin, 629 N.E.2d 915, 922 (Ind. Ct. App. 1994), reh’g denied, trans. denied). Instead, we look only to the evidence and inferences therefrom which support the jury’s verdict. Id. “[I]f there is any evidence in the record which supports the amount of the award, even if it is variable or conflicting, the award will not be disturbed.” Id. “Our inability to actually look into the minds of the jurors is, to a large extent, the reason behind the rule that we will not reverse if the award falls within the bounds of the evidence.” Id. (quoting Annee v. State, 256 Ind. 686, 690, 271 N.E.2d 711, 713 (1971), reh’g denied). “We cannot invade the

province of the jury to decide the facts and cannot reverse unless the verdict is clearly erroneous.” Id. This standard has been summarized as follows:

A personal injury award is not excessive where (1) the award was not based upon jury prejudice, partiality, or corruption, (2) the jury has not misunderstood or misapplied the evidence, (3) the award was not based upon consideration of an improper element such as liability insurance, and (4) the award was within the parameters of the evidence. Martin v. Roberts (1984), Ind., 464 N.E.2d 896, 905. Under such circumstances, we will not substitute our judgment for that of the jury as to reasonable compensation for a plaintiff.

Kimberlin v. DeLong, 637 N.E.2d 121, 130 (Ind. 1994), reh’g denied, cert. denied, 516 U.S. 829, 116 S. Ct. 98 (1995).

The jury here awarded Wilson damages of \$565,000.00 and assessed 47.5% fault to Kennedy for a judgment against Kennedy of \$268,375.00. Kennedy argues that the damages are excessive because Wilson was unemployed at the time of the assault, some of Wilson’s medical bills were paid by a charity, and Wilson failed to present evidence that he is now unable to work.⁴

Wilson presented evidence that, during the night after the fight, his leg began to swell, and he experienced severe pain. The doctors found that Wilson had sustained two fractures in his leg – comminuted fractures of his right tibia and his fibula. The fractures

⁴ Kennedy also argues that Wilson was an equal participant in the fight and that Wilson initially declined medical treatment. These arguments are more relevant to the jury’s apportionment of fault than Wilson’s damages. “We note that the apportionment of fault is uniquely a question of fact to be decided by the fact-finder.” St. Mary’s Medical Center of Evansville, Inc. v. Loomis, 783 N.E.2d 274, 285 (Ind. Ct. App. 2002). The point where apportionment of fault becomes an issue of law solely for the trial court “is reached only when there is no dispute in the evidence and the fact-finder is able to come to only one logical conclusion.” Id. Kennedy makes no specific argument regarding the fault apportionment, and this issue is waived. See Ind. Appellate Rule 46(A).

had resulted in compartment syndrome, which his surgeon described as “one of the most painful conditions that can . . . be suffered.” Appellant’s Appendix at 427. When he came to the hospital, Wilson had no blood flow in his leg below his knee. He was hospitalized for nine days and had four surgeries. After the first surgery, the surgeon left an open incision in Wilson’s leg because of the severe swelling. During the subsequent surgeries, the surgeon would attempt to close some of the incision, remove dead muscle tissue, and clean the wound.

As a result of the injuries to his leg, Wilson suffered damage to the peroneal nerve, resulting in a permanent inability to flex his foot upward, which is sometimes called “dropped foot.” Id. at 439. Because of his inability to flex his foot, Wilson walks with the aid of a foot drop splint. Wilson also has “a very mild hyperesthetic condition” in his leg, which means that he has abnormal pain instead of normal feelings in his leg. Id. at 457. Wilson is at risk for developing reflex sympathetic disorder, which is a “painful condition” in which the limb “becomes very sensitive to any kind of stimuli.” Id. at 456. Wilson is unable to work and receives Social Security Disability benefits.

There is no indication that the jury’s damage award was based upon prejudice, partiality, or corruption, that the jury misunderstood or misapplied the evidence, or that the award was based upon the consideration of an improper element such as liability insurance. Moreover, given the extent of Wilson’s pain and suffering, his permanent nerve damage, his inability to work, and his age, we conclude that the damage award was

within the scope of evidence. See, e.g., Clancy v. Goad, 858 N.E.2d 653, 660 (Ind. Ct. App. 2006) (affirming a jury's \$10 million damage award where the accident victim had devastating injuries, permanent disabilities, and continuing pain and suffering), trans. denied.

For the foregoing reasons, we affirm the judgment against Kennedy.

Affirmed.

NAJAM, J. and DARDEN, J. concur